

From: Peter Anderson
To: Microsoft ATR
Date: 1/28/02 4:44pm
Subject: MICROSOFT SETTLEMENT

Please find attached my comments in the Microsoft Settlement.

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Ms. Renata B. Hesse
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Re: MICROSOFT SETTLEMENT COMMENTS

Ms. Hesse:

I would like, if I may, to forgo adding any further efforts to muddy the law and, instead, just comment on the proposed settlement as a consumer who uses a PC computer. With all the *drang* and *sturm* already surrounding this case, the interests of the consumer can sometimes get lost in the legal crossfire.

Separate from the arcana of the law, there are two competing views that have been expressed to determine the consumer's interest, as regards the benevolence of the monopoly that Microsoft maintains over desktop operating systems, and against which the proposed settlement ought to be judged.

The first, and most easy to understand, is the view ably championed by Microsoft. That points to the great advantages in convenience from having a single seller that, alone, can erect a seamless intra and inter connectivity among the various applications on one's own desktop and in electronic communications with different computer users using different platforms. Certainly the convenience factor has some merit and, I must confess, some of my computer-using colleagues with whom I discuss these issues second Mr. Gates' feelings.

On the other hand, and less readily understood but eminently as vital, is the essential creative energy for dynamic change and future progress that only emanates from disorganization and chaos, both of which are, too often, swallowed in the maw of a monopoly, especially one, like here, that has been found to wantonly abuse its monopoly power. That is why I believe this excerpt from the Pulitzer Prize winning book, *Guns, Germs and Steel*, is so instructive

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for how to structure a remedy in this case, if you will indulge me in this short detour to an explanation of why civilizations expand and fall—

“Why did China lose its [technological] lead [over Europe]? Its falling behind is initially surprising because China enjoyed undoubted advantages ...

“These advantages and head start enabled medieval China to lead the world in technology. The long list of its major technological firsts ... In the early 15th century it sent treasure fleets, each consisting of hundreds of ships up to 400 feet long and with total crews of up to 28,000, across the Indian Ocean as far as the coast of Africa, decades before Columbus’s three puny ships crossed the narrow Atlantic Ocean to the Americas’ east coast. Why didn’t Chinese ships proceed around Africa’s southern cape westward and colonize Europe, before Vasco da Gama’s own three puny ships rounded the Cape of Good Hope eastward and launched Europe’s colonization of East Asia? Why didn’t Chinese ships cross the Pacific to colonize the America’s west coast? Why, in brief, did China lose its technological lead to the formally so backwards Europe?

“The end of China’s treasure fleets gives us a clue. Seven of those fleets sailed from China between A.D. 1405 and 1433. They were then suspended as a result of a typical aberration of local politics that could happen anywhere in the world: a power struggle between two factions at the Chinese court (the eunuchs and their opponents). The former faction had been identified with sending and captaining the fleets. Hence when the latter faction gained the upper hand in a power struggle, it stopped sending fleets, eventually dismantling the shipyards, and forbade oceangoing shipping. ...But in China ... because the entire region was politically unified ... [o]ne decision stopped fleets over the whole of China. ...

“Now contrast those events in China with what happened when fleets of exploration began to sail from politically fragmented Europe. Christopher Columbus, an Italian by birth, switched his allegiance to the duke of Anjou in France, then to the king of Portugal. When the latter refused his request for ships in which to explore westward, Columbus turned to the duke of Medina-Sedonia, who also refused, then to the count of Medina-Celi, who did likewise, and finally to the king and queen of Spain, who denied Columbus’s first request but eventually granted his renewed appeal. **Had Europe been united under one of the first three rulers, its colonization of the Americas might have been stillborn.**”
Jared Diamond, *Guns, Germs and Steel: the Fates of Human Societies*,

W.W.Norton & Co. (1999), at pp. 411-413 (emphasis added).

The same motivating forces that animate a civilization described by Mr. Diamond similarly infect those of companies, technologies and markets. Microsoft certainly has much to be proud of in prevailing over so many of its competitors. But innovation does not number high on that list.

Whether we think back to the first "killer app," the spreadsheet, or the word processor, not to mention the mouse, the user-friendly WYSIWYG interface, the world wide web, media streaming, music sharing or almost anything else that has caught fire in the market, it was someone other than Microsoft who conceived and gave life to these ideas so critical to the realization of the full potential of computing. Furthermore, the fact that Microsoft exercised its monopoly power over the desktop to destroy so many of these inventors, depriving them of their just reward for their labors, is of great concern for an economy whose lifeblood literally depends upon the nourishment of innovation.

What Microsoft has added to the equation apart from technical refinements is, essentially, marketing – marketing with the unique power that arises not because it has developed the newest or best product for the consumer, but rather the dominance that derives from the illegal extension of its desktop operating system monopoly.

This is not a contentious statement. The company's executives openly acknowledge the fact, as in the *Wall Street Journal* profile that ran following Mr. Gates handing day-to-day control over to Mr. Ballmer two years ago at the height of this litigation. "Mr. Ballmer's ascension signals –

"the shift in power at Microsoft from those with purely technical minds to those who can fuse technology with business sense and customer concerns. For example, Microsoft's consumer chief Rick Belluzzo, a longtime Hewlett-Packard Co. executive whom Mr. Ballmer recruited, says **the success of Microsoft's Web efforts depend more on marketing than technology.**" David Bank, "How Steve Ballmer Is Already Remaking Microsoft," *Wall Street Journal* (Jan. 17 '00) (emphasis added).

Nor ought that statement to be surprising. It is in the essential nature of organization that, once primacy in some endeavor is achieved, every sinew in its corporeal body is marshaled toward the defense of the product at the source of its power, to be free of the unpleasantness of brutish competition, and to enjoy the quiet life of the monopolist.

Understandable though that may be for any monopoly, including Microsoft, this condition does not demarcate the consumer interest. Rather it is antithetical to it. Messy but vibrant competition is the only proven engine to maintain the pressure to constantly strive and to provide rewards for those who succeed.

Absent clear and enforceable constraints on the extension of Microsoft's desktop monopoly to the web and beyond, the future will be the worse for the dead weight of their monopoly. If the trial court's original structural remedy breaking up the operating system monopoly from applications and the web is off the table, then it is absolutely essential that the final judgment erect an impenetrable wall preventing Microsoft's conduct from extending its monopoly into the new frontiers that advanced computation have opened.

This includes a ban on bundling or otherwise tying the sale of its Windows operating system with any other software product whose essential purpose is to communicate to or from the world wide web or manipulate digitized sights and sounds, all of which are outside the OS market and none of which is mission critical for a desktop computer to operate. At the same time, Microsoft must also open all its evolving source code with complete documentation to competing developers so that they are given a fair opportunity to be the first to market for mid-ware with product that is seamlessly integrated into the operating system. Lastly, the defaults built into the operating system cannot steer the passive user to Microsoft's products, such as the Word folder that Outlook Explorer continues to steer me to when attaching files such as this to email, impervious to my best efforts to change that default setting.

Mind you, none of this means that Microsoft ought to be stopped from marketing any product that they chose, so long as it is unbundled in its own shrink wrap to insure that they are forced to compete on a level playing field. Even if they had acquired their monopoly power on the desktop legally – and the trial court found otherwise – that tragedy would be inexcusably compounded in a black mark on the legal system were they now permitted to leverage that illegal monopoly into new markets and, in the process, slow the development of future opportunities on which America's leadership depends.

For all his accomplishments, Mr. Gates ought not to be heard to complain about the intervention of the anti-trust laws in his path to market power inasmuch as Microsoft only exists by virtue of the fact that the Justice Department had previously sued IBM for anti-trust violations, which at the time had a near monopoly in mainframe computers. The reason IBM visited

young Mr. Gates that fateful day in 1979 in search of an outside party to provide an operating system for IBM's first personal computer was, by moving that product extension in someone else's hands, to throw the antitrust wolves off their traces, not because they had any capacity or desire to develop their own product in-house.

Now it is time for him to recognize that the sun which has shined on him is setting. For the immediate future, Microsoft can continue to enjoy monopoly rents on a mature business so long as it refrains from those acts found unlawful that illegally sustain its monopoly, but it must leave future markets to be conquered only by those who fairly prevail on the field of competition.

It is in its dynamic economy that America has defined its greatness. In that achievement, however, lay the seeds of our own decline if we let ourselves become prey, as so many civilizations have before us, to subside into complacency, lured by the siren call of convenience and its hand maiden, the status quo.

With the future of economic growth so tied to the ability to multiply human productivity through advances in computation, it would be a tragedy of the first order to let that happen. This case creates the opportunity to seize a far better future than the convenient but far more limited one promised by Microsoft.

Sincerely,

Peter Anderson